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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1248

GERALD A. SCHROEDER and CLARA JOHNSON SCHROEDER,

Petitioners,

VS.

STATE OF ILLINOIS, BERNARD J. KORZEN, COUNTY TREASURER OF COOK COUNTY, TRUSTEES OF SCHOOLS OF TOWNSHIP 42 NORTH, RANGE 11 EAST OF THE THIRD PRINCIPAL MERIDIAN, COOK COUNTY, ILLINOIS, FOR THE USE AND BENEFIT OF BOARD OF EDUCATION, SCHOOL DISTRICT 57, COOK COUNTY, ILLINOIS, WILBERT J. J. WAHLER and DANIEL W. PECYNA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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INDEX

PAGE

Opinion Below 2

Grounds on Which the Jurisdiction of this Court Is Invoked 2

Question Presented for Review 3

Constitutional and Statutory Provisions Involved 3

Statement of Facts 4

Reasons Relied On for Allowance of a Writ of Certiorari 11

Argument 12

Conclusion 19

Appendices:

A—Opinion of the United States Court of Appeals for the Seventh Circuit 1a-6a

B—Constitutional Provisions Involved 7a

C—Statutes Involved 8a-11a

D—Traverse 12a-18a

List Of Authorities Cited.

Cases:

Barrows v. Jackson, 346 U.S. 249 (1953) 16
City of Cincinnati v. Vester, 281 U.S. 439 (1930) 14
County of Allegheny v. Frank Mashuda Company, 360 U.S. 185 (1959) 15
Hansberry v. Lee, 311 U.S. 32 (1940) 16
Kelly, et al. v. Bowman, et al., 104 F. Supp. 973 (E.D. Ill. 1952); aff'd 202 F. 2d 275 (C.A. 7th 1953) 12
McGuire v. Sadler, 337 F. 2d 902 (C.A. 5th 1964) 17
Monroe v. Pape, 365 U.S. 167 (1961) 18
People ex rel White v. Busenhart, 29 Ill. 2d 156 (1963) 8, 13
Shelly v. Kramer, 334 U.S. 1 (1948) 16
Townsend v. Sain, 372 U.S. 293 (1963) 19
Trustees of Schools, etc. v. Schroeder, 23 Ill. 2d 74 (1961) and 25 Ill. 2d 289 (1962) 5, 6, 7, 10, 13
United States v. Price, ... U.S. ....., 86 S. Ct. 1152 (1966) 18

Statutes:

28 U.S.C. Sec. 1331(a) 16, 18, 8a
28 U.S.C. Sec. 1343(3) 16, 18, 8a
42 U.S.C. Secs. 1981, 1982, 1983, 1985 ..... 8a-11a

Constitution of the United States:

Fifth Amendment 7a
Fourteenth Amendment 17

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STATE OF ILLINOIS, BERNARD J. KORZEN, COUNTY TREASURER OF COOK COUNTY, TRUSTEES OF SCHOOLS OF TOWNSHIP 42 NORTH, RANGE 11 EAST OF THE THIRD PRINCIPAL MERIDIAN, COOK COUNTY, ILLINOIS, FOR THE USE AND BENEFIT OF BOARD OF EDUCATION, SCHOOL DISTRICT 57, COOK COUNTY, ILLINOIS, WILBERT J. J. WAHLER and DANIEL W. PECYNA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

To: *The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States*

Your petitioners, Gerald A. Schroeder and Clara Johnson Schroeder, respectfully pray that a writ of certiorari be issued from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause.

OPINION BELOW.

No formal opinion was rendered by the District Court for the Northern District of Illinois.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 354 F. 2d 561 (1965), and is attached hereto as Appendix A, pp. 1a-6a.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment sought to be reviewed is November 2, 1965.

2. A timely petition for rehearing was filed. The court denied the petition for rehearing on February 7, 1966.

3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW.

Did a complaint for declaratory judgment and an injunction which invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1343(3), state a cause of action when the complaint alleged that in violation of 42 U.S.C. §§ 1981, 1982 and 1983, defendant public school district purports to have taken fee simple title to an entire tract of land owned by petitioners by means of a state court judgment in an eminent domain proceeding where the state court had no jurisdiction in such a proceeding to do more than award an easement for use for school purposes on so much of the land as was needed for those purposes; that petitioners were denied due process in the state court proceeding; and the complaint further alleged that all of the defendants have conspired in violation of 42 U.S.C. § 1985 to deprive petitioners of title to their land by means of a void state court judgment and have conspired to deny petitioners equal protection of the laws.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Involved here are the Fourteenth Amendment to the Constitution of the United States (Appendix B, p. 7a); 28 U.S.C. §§ 1331(a) and 1343(3); and 42 U.S.C. §§ 1981, 1982, 1983 and 1985 (Appendix C, pp. 8a-11a).

STATEMENT OF FACTS.

On or about January 17, 1964, Gerald A. Schroeder and his wife, Clara Johnson Schroeder, filed a complaint in the United States District Court for the Northern District of Illinois against the State of Illinois; Bernard J. Korzen, County Treasurer of Cook County, Illinois; the Trustees of Schools of Township 42 North, Range 11, East of the Third Principal Meridian, Cook County, Illinois, for the use and benefit of the Board of Education of School District 57 of Cook County, Illinois; Wilbert J. J. Wahler and Daniel W. Pecyna. The last two named defendants are members of the bar of the State of Illinois, who represented the petitioners in certain proceedings in the courts of Illinois.

In that complaint petitioners invoked the jurisdiction of the district court under 28 U.S.C., §§ 1331(a) and 1343(3), and charged the defendant state officers with violating the provisions of 42 U.S.C., §§ 1981, 1982 and 1983 by taking land belonging to petitioners through a void state court judgment in an eminent domain proceeding. The complaint further charged all of the defendants with conspiring to deprive petitioners of title to their land by means of that void state court judgment and further conspiring to deny petitioners equal protection of the laws all in violation of 42 U.S.C., § 1985. Each of the defendants moved to dismiss the complaint. The district court dismissed the complaint without a formal opinion but stated its grounds (Appendix, pp. 149-155), and the Court of Appeals affirmed.

In substance, the allegations of the petitioners, which stand admitted by the several motions to dismiss, are that petitioners owned, lived on and farmed, and had done so for some years, approximately 18 acres of land with frontage of about 1800 feet on a widely traveled highway in Mt. Prospect, Illinois, a suburb of Chicago. That land was described by the Supreme Court of Illinois in *Trustees of Schools, etc.* v. *Schroeder,* 23 Ill. 2d 74, 76, 177 N.E. 2d 178, 179 (1961) as follows:

> "The property, which is presently used as a truck farm, is in many ways unique, making comparison sales a difficult and inconclusive criterion. It is located in the heart of a thriving area of shopping-center development. A short distance to the southeast on Rand Road a 40-acre shopping center for chain store tenants is under construction and one-half mile to the northwest on Rand Road a 60-acre shopping center is under construction. The subject property itself is adjacent to the village of Mount Prospect, being six blocks from the business district of the village. It is within easy access of schools, parks, churches, toll roads, expressways and public transportation. Water and sewers are available at the property and the surrounding area is building up rapidly. Rand Road, upon which the tract has extensive frontage, is United States Route 12 and is a heavily traveled thoroughfare."

In 1959 the respondent school district filed a petition in the Circuit Court of Cook County seeking fee simple title to the whole 18 acre tract allegedly for school purposes. The petitioners, then represented by respondents Wahler and Pecyna, filed an elaborate traverse, later expanded by amendment with leave of court, *inter alia,* denying that the school district sought to take the property for public purposes and denying that the school district had

the power to take fee simple title to the land for public purposes.

After hearing evidence on the issues made by it the Circuit Court of Cook County denied the traverse. The question of the value of the property was then presented to a jury which returned a verdict that the value of the property was $267,083.33. On a post-trial motion by the school district the court ruled that unless there was a remittitur by petitioners to reduce the award to $225,000, a new trial would be granted. When petitioners refused to agree to the remittitur the court ordered a new trial.

On appeal from that order the Supreme Court of Illinois reversed it in *Trustees of Schools, etc.* v. *Schroeder,* 23 Ill. 2d 74, 177 N.E. 2d 178 (1961), holding that the trial court had no power to require a remittitur in an eminent domain proceeding. The Supreme Court, however, though the petitioners raised the issues on the appeal, refused to pass on the merits of the traverse because the appeal was from an order granting a new trial.

On remand of the proceedings to the Circuit Court of Cook County, that court entered a judgment awarding fee simple title in the whole tract to the respondent school district on condition that it pay petitioners the amount of the jury's verdict plus interest. A few days later the trial court found that the requisite amount had been deposited with the respondent county treasurer to be paid to petitioners and entered an order vesting the fee simple title to the whole tract in the school district.

Petitioners appealed from that order but, without their knowledge, their counsel, respondents Wahler and Pecyna, on that appeal, despite the other issues raised in the

traverse, contended only that a school district of this class could not take land by eminent domain within 40 rods of the owners' dwelling. That issue was decided against petitioners in *Trustees of Schools of Township 42, etc.* v. *Schroeder,* 25 Ill. 2d 289, 184 N.E. 2d 872 (1962).

When petitioners learned that the various issues raised by the traverse as to the authority of the school district to take all of the tract and to take title in fee simple to the tract had not been raised on the appeal they retained other counsel, Alfred M. Loeser and Stephen Lee of the Illinois bar, who immediately filed a petition for rehearing with the Illinois Supreme Court reasserting the issues raised on the traverse and asserting that the taking of petitioners' property by virtue of the judgment of the Circuit Court of Cook County in eminent domain under these circumstances deprived petitioners of their land in violation of rights protected by the Constitution of the United States. That petition for rehearing was denied on September 27, 1962, without opinion.

Mr. Loeser and Mr. Lee continued to represent petitioners in these matters until each died while the instant case was pending in the Court of Appeals for the Seventh Circuit.

Immediately upon the denial of their petition for rehearing petitioners sought in the Circuit Court of Cook County to vacate the condemnation judgment and to stay the proceedings in condemnation. In that petition it was reasserted that the school district was not taking the land for public purposes and that the court did not have power to award more than an easement for school purposes to so much of the land as might be necessary for those purposes. Petitioners sought to present evidence in support

of that petition but the court refused to hear any such evidence.

As soon as the deposit had been made with the County Treasurer the school district sought by various means to obtain possession of petitioners' land. As early as December 13, 1961, while the second appeal was pending in the Illinois Supreme Court, the school district forcibly took possession of the land, ousted petitioners and destroyed their produce business at the height of the season of Christmas sales. After the opinion on that appeal was issued but while the petition for rehearing was pending in the Supreme Court of Illinois, the school district sought in the Circuit Court of Cook County a supplemental writ of possession to the land. After the petition for rehearing was denied, that writ issued and the Circuit Court denied the petition to vacate its judgment on October 4, 1962. Petitioners appealed from that order.

Meanwhile, petitioners and 12 other taxpayers, residents of the school district, sought leave to file a taxpayers' complaint for an injunction restraining the school district from taking petitioners' land charging, on a number of grounds, that the school district was proceeding in violation of the law. The Circuit Court of Cook County denied leave to file the taxpayers' suit. An appeal was taken from that order. That appeal and the appeal of the petitioners from the order of October 4, 1962, were consolidated. In *People ex rel. White, et al.* v. *Busenhart, et al.*, 29 Ill. 2d 156, 193 N.E. 2d 850 (1963), the Circuit Court of Cook County was affirmed in both cases. With respect to the appeal of petitioners, the Illinois Supreme Court said, 29 Ill. 2d 156, 159, 193 N.E. 2d 850, 853 (1963):

• • • • •

"In the eminent domain feature of this appeal the Schroeders seek to raise the following issues: (1) That the court had no 'jurisdiction' to enter judgment for the taking of a fee-simple title; (2) that the property is exempt from condemnation because of its location within 40 rods of the owners' dwelling; (3) that the ordinance (resolution) authorizing condemnation was void for lack of a quorum at the time of its passage; (4) that there was abandonment of the project by failure to pay the award within 150 days of October 27, 1960, as directed; and (5) that the appeal bond was void.

"[1-7] All of these points could have been raised in the second appeal, in fact (2) above was conclusively adjudicated against the Schroeders, and they are now barred. The rule has long been recognized that no point which was raised, or could have been raised in a prior appeal on the merits, can be urged on a subsequent appeal, and those not raised are considered as waived. (*Semple* v. *Anderson,* 4 Gilm. 546; *Union Mutual Life Ins. Co.* v. *Kirchoff,* 149 Ill. 536, 36 N.E. 1031; *Jackson* v. *Glos,* 249 Ill. 388, 94 N.E. 502.) 'Where an order or decree is reversed and the cause is remanded by this court, with specific directions as to the action to be taken by the trial court, the only question properly presented on appeal is whether the order or decree is in accordance with the mandate and directions of this court.' (*People* v. *National Builders Bank of Chicago,* 12 Ill. 2d 473, 476-477, 147 N.E. 2d 42, 44.) Despite the rule, the prayer of the petition for the taking of a fee-simple title, *and the failure to even include the question in the traverse,* the Schroeders contend that it goes to the jurisdiction of the court and can be raised either directly or collaterally. In *Chicago Housing Authority* v. *Berkson,* 415 Ill. 159, 112 N.E. 2d 620, the right of the condemnor to acquire property by eminent domain was questioned and alleged to be jurisdictional. It

was there said, 415 Ill. at pages 161 and 162, 112 N.E. 2d at page 621: "* * * (T)he objection was waived by failure to raise it at the appropriate time. The objection goes only to the right of the condemnor to acquire property by eminent domain. It does not affect the general jurisdiction of the court over the subject matter of an eminent domain action.' There, the condemnor's right to acquire by eminent domain was attacked, while here only the extent of the estate to be taken is alleged to be grounds for going behind the judgment. We are of the opinion that the fee-simple-title question is barred." (Emphasis supplied.)

* * * * *

In light of the emphasized portion of the opinion of the Supreme Court of Illinois a copy of the traverse and the amendment thereto taken from the Abstract of Record in the second appeal, *Trustees of Schools of Township 42* v. *Schroeder,* supra, is appended hereto as Appendix D, and this Court is respectfully urged to take judicial notice of that traverse.

No petition for certiorari to this Court was filed seeking review of either of the two decisions by the Supreme Court of Illinois adverse to petitioners. Instead the complaint in the instant case was filed about two months after the denial of a petition for rehearing by the Illinois Supreme Court in that last appeal.

In the fall of 1962 the school district built a small intermediate grade school on one-quarter acre of the 18 acre tract taken from petitioners. The school building is located the maximum distance from the Rand Road frontage which is not being used for a school or school purposes.

In their complaint in this cause petitioners sought a declaratory judgment that the taking of a fee simple title to their land denied due process of law to petitioners and that the judgments of the Circuit Court of Cook County awarding the land to the school district were void and that the mandate of the Supreme Court of Illinois in the last appeal was void. In addition, the petitioners prayed an injunction restraining the respondents and their agents, etc., from claiming ownership of the land or interfering with the petitioners as the rightful owners and restraining defendants from interfering with the fund in the custody of the county treasurer.

REASONS RELIED ON FOR ALLOWANCE OF A WRIT OF CERTIORARI.

In this cause the Court of Appeals has decided a federal question in a way which is in conflict with applicable decisions of this Court and has so far sanctioned such a departure by the district court from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT.

It is fundamental to our system of private ownership of property that government, neither federal, state nor local, may take private property save for public use and then, only upon payment of just compensation. It is equally fundamental to our system of ordered liberty that the courts, both state and federal, provide protection for those rights of private property. In this case, despite their continuous efforts, petitioners have been denied that protection by both state and federal courts. Indeed, in this case the courts, both state and federal, have refused to hear petitioners assertions as to their property rights.

Basically petitioners contend, and have sought to do so throughout tortuous litigation, that the school district has taken their property but not for public use and that, in any event, the school district has taken more of their property, both in quantity and in extent of title, than was justified for any public use. Petitioners owned 18 acres of highly valuable, well-located, land in a rapidly developing suburban area. Without contradiction, the record here shows that nearly five years after the school district took fee simple title to all 18 acres, the school district has used only one-quarter of one acre of the tract at the back end leaving untouched and unused the remaining 17 acres including the obviously more valuable Rand Road frontage (App., pp. 78-80). The law of Illinois is clear that this school district had no power to take fee simple title by eminent domain. See *Kelly, et al.* v. *Bowman, et al.*, 104 F. Supp. 973 (E.D. Ill. 1952); aff'd 202 F. 2d 275, 276 (C.A. 7th 1953). In that case, the Court of Appeals flatly stated:

* * * * *

"Judge Casper Platt, by whom the case was tried, filed an opinion, *Kelly* v. *Bowman,* D.C., 104 F. Supp. 973, which contains an adequate statement of the facts, as well as a thorough analysis of the applicable Illinois law. Inasmuch as we agree with the result which he reached, as well as the reasoning upon which it is predicated, we think no good purpose could be served in writing an opinion. We therefore adopt the opinion of Judge Platt as that of this court."

* * * * *

Significantly, in none of its opinions involving this land has the Illinois Supreme Court questioned the proposition that the school district had no power to take a fee simple title. Instead the Illinois Supreme Court has steadfastly refused even to consider the question. The only justification which that Court has offered for its refusal to consider this deprivation of petitioners' rights is found in *People ex rel White* v. *Busenhart,* supra. That justification, strangely enough, is that the issue was not raised in the traverse. Obviously the Illinois Supreme Court was mistaken with respect to that fact (see Appendix D, this petition). Equally, the Illinois Supreme Court was mistaken in its assertion that the issue was not raised on the so-called second appeal. It was raised by the petition for rehearing and apparently ignored.[1]

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[1] It is the practice of the Illinois Supreme Court to issue printed copies of its opinion to the parties upon the filing of the opinion with the Clerk of that Court. If a petition for rehearing is filed the Court may withdraw the opinion, modify the opinion, or leave it unchanged if the rehearing is denied. In *Trustees of Schools of Township 42, etc.* v. *Schroeder,* supra, the second appeal, the original opinion issued May 25, 1962, remained

Thus, in the instant case, petitioners sought to present to the district court a plea for federal remedy in a case where it was alleged and uncontradicted, that state officials had taken more of petitioners' land than the state officials had any authority so to do and that they had taken more of the title than they had any authority so to do.

It seems never to have been doubted in this Court that the Fourteenth Amendment prohibits state officers from expropriating privately-owned land just as the Fifth Amendment prohibits federal officers from taking land from private owners. In *City of Cincinnati* v. *Vester*, 281 U.S. 439, 446-447 (1930), then Chief Justice Hughes, in an "excessive condemnation" case pointed out:

* * * * *

> "It is well established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution.[1] In the present instance, we have no legislative declaration, apart

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unchanged and the petition for rehearing was denied on September 27, 1962. It thus appears that while the Illinois Supreme Court had before it the issue of the power of the school district to take title by eminent domain to the whole of the 18 acres, that Court never indicated its ruling as to the issue or any basis for such a ruling.

from the statement of the city council, and no judgment of the state court as to the particular matter before us. Under the provision of the Constitution of Ohio for excess condemnation when a city acquires property for public use, it would seem to be clear that a mere statement by the council that the excess condemnation is in furtherance of such use would not be conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital. This would be to treat the constitutional provision as giving such a sweeping authority to municipalities as to make nugatory the express condition upon which the authority is granted." (Footnote omitted.)

* * * * *

The cases cited in the omitted footnote are all to the same effect.

More recently in *County of Allegheny* v. *Frank Mashuda Company,* 360 U.S. 185 (1959), this Court affirmed a decision of the Court of Appeals for the Third Circuit that a district court was in error in dismissing a complaint by a land owner who contended that his land had been taken by a county board for private not public use. In that case, just as in this one, the district court had refused to exercise the jurisdiction vested in it by the Judiciary Act because the district court believed that there was a threat to state-federal relationships in the exercise of such jurisdiction. This Court, however, found no justification for "abstention" from the exercise of federal jurisdiction in the suit of the land owner who complained that his property was taken for private use.

Ironically, in the *Mashuda* case, supra, it was agreed that the land owner had a remedy in the Pennsylvania state courts to raise the issue which he sought to raise

in the federal court. In the instant case petitioners have no such remedy in the state court. In fact, despite their unremitting efforts to secure a state court remedy, the Illinois courts have emphatically refused to provide a remedy.

This Court has repeatedly made it clear that state judicial action may itself violate the Fourteenth Amendment to the Constitution of the United States. Appropriately, the leading decisions in that respect involve the rights of land owners. See *Shelly* v. *Kramer,* 334 U.S. 1 (1948); *Barrows* v. *Jackson,* 346 U.S. 249 (1953), and *Hansberry* v. *Lee,* 311 U.S. 32 (1940). The *Hansberry* case, supra, makes it clear that where the state court, as here, has refused to consider the merits of constitutional claims, property owners are denied procedural due process as well as substantive due process.

In the instant case petitioners invoked the jurisdiction of the district court on dual grounds. The complaint relied upon 28 U.S.C., §§ 1331(a) and 1343(3). By amendment, with leave of court (App., p. 35), the complaint alleged that the amount involved exceeds $10,000 and that federal and constitutional questions were involved. Accordingly, the complaint plainly stated a cause of action under 28 U.S.C., § 1331(a). The Court of Appeals, however, was apparently of the opinion that no federal question could be presented because "the state court admittedly had jurisdiction over the parties and the subject matter. * * *" That holding, we respectfully submit is entirely inconsistent with the views expressed by this Court in *Shelly* v. *Kramer,* supra, *Barrows* v. *Jackson,* supra, and *Hansberry* v. *Lee,* supra. In all of those cases the state court also had jurisdiction of the parties and of the subject matter. Nevertheless this Court ruled that the state judicial action itself violated

the Fourteenth Amendment to the Constitution of the United States. We respectfully suggest that this is precisely the situation here.

The view of the Court of Appeals in the instant case is plainly inconsistent with respect to the scope of federal jurisdiction voiced in *McGuire* v. *Sadler*, 337 F. 2d 902, 906 (C.A. 5th 1964). In that case the court observed:

* * * * *

"Quite apart from the question of impairment of contract, the plaintiff's Fourteenth Amendment claim stands on its own feet. There is no question that there was state action for the purpose of invoking the Fourteenth Amendment. *Monroe* v. *Pape*, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492; *Hornsby* v. *Allen*, 5 Cir. 1964, 326 F. 2d 605. And there is deprivation of property—if we accept plaintiff's allegations. The fraud of the Commissioner, if a fact, would be enough to require the nullification of his findings and subsequent action. In addition, the plaintiff alleges various procedural shortcomings in the state proceedings. He alleges that he was denied the time and access to information needed in order to defend his interest; that the Commissioner and the co-conspirators used various unfair stratagems during the hearing in order to prevent his being heard; that the Commissioner was present at the hearing for only a few minutes, which resulted in a clerk's (the Chief Clerk's) conducting the hearing. If such procedural shortcomings are found to have existed and if indeed they deprived the plaintiff of a fair and adequate hearing, these findings would seem sufficient for a showing of a Fourteenth Amendment violation.

"[9] The plaintiff also invokes the equal protection clause of the Fourteenth Amendment. He employs the words 'fraudulent' and 'wilful' not just opprobriously but to show allegedly purposeful discrimination. The allegations of fraudulent and discrim-

> inatory official action are made with specificity so as to bring the plaintiff within even the conservative definition of equal protection announced in *Snowden* v. *Hughes*, 1944, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497. See also *Hornsby* v. *Allen*, 5 Cir. 1964, 326 F. 2d 605."

* * * * *

Both that decision and *Monroe* v. *Pape*, 365 U.S. 167 (1961), make it clear that in addition to invoking the jurisdiction of the district court in this cause under § 1331, petitioners also properly invoked the jurisdiction of the district court under 28 U.S.C., § 1343(3). Petitioners alleged both acts of state officials, the school district, state courts and the county treasurer in violation of the Fourteenth Amendment. They also charged a conspiracy between those state officers and private persons, petitioners' former counsel, to deprive them of equal protection of the laws as well as other rights guaranteed by the Constitution of the United States. At this term this Court in *United States* v. *Price*, ... U.S. ....., 86 S. Ct. 1152 (1966), made it clear that joint participation of private persons and state officials in prohibited conduct is action "under color" of law within the meaning of the Civil Rights Act.

Thus, the dismissal of the complaint in this cause denied to petitioners access to the federal courts provided for under two sections of the Judicial Act.

The real ground for denying a federal remedy to petitioners appears to have been the state court decisions. It is clear from the record in this case, however, that the state courts have never considered the federal issues involved here. It is equally clear that the decisions of this Court do not warrant denial of federal protection for federal constitutional rights because a state court has

refused to consider the questions. Ironically, the leading cases on this point are cases in which this Court has required lower federal courts to consider claims of federal constitutional rights in criminal cases. See e.g., *Townsend* v. *Sain,* 372 U.S. 293 (1963). We respectfully submit that the rights of land owners are entitled to the same protection from unlawful acts by state officials as is the liberty of persons charged with crime.

CONCLUSION.

For all of the foregoing reasons we respectfully urge this Court to issue its writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit in this matter. In this period of wide-spread use of the power of eminent domain by federal, state and local officials, it is imperative for the protection of all persons in the United States that it be made clear that the law of the United States does not permit unconscionable abuse of the power of eminent domain by government officers.

Respectfully submitted,

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APPENDIX A

In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

SEPTEMBER TERM, 1965—SEPTEMBER SESSION, 1965

No. 14920
GERALD A. SCHROEDER and
CLARA JOHNSON SCHROEDER,
Plaintiffs-Appellants,

v.

STATE OF ILLINOIS, BERNARD J. KORZEN, County Treasurer of Cook County, TRUSTEES OF SCHOOLS of Township 42 North, Range 11, East of the Third Principal Meridian, Cook County, Illinois, for the use and benefit of BOARD OF EDUCATION, School District 57, Cook County, Illinois, WILBERT J. J. WAHLER and DANIEL W. PECYNA,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 2, 1965

(U. S. Court of Appeals Opinion)

Before HASTINGS, *Chief Judge*, KNOCH and KILEY, *Circuit Judges*.

KILEY, *Circuit Judge*. This suit invoked the district court's jurisdiction under 28 U.S.C. § 1331 and § 1343(3)[1] for declaratory judgment and injunctive relief based on alleged violation of the Reconstruction era Civil Rights Act, presently sections 1981 to 1985 of Title 42, United States Code. The district court dismissed for want of jurisdiction. We affirm.

Plaintiffs, Gerald and Clara Schroeder, were owners of 17.78 acres of land in Mount Prospect, Illinois, in November, 1959, when defendant-Trustees filed suit in the Circuit Court of Cook County to condemn the property for school purposes. A jury's verdict awarded the Schroeders $267,083.33, and judgment was entered on the verdict. The Circuit Court ordered a new trial, but this order was reversed on appeal. *Trustees of Schools* v. *Schroeder*, 23 Ill. 2d 74, 177 N.E. 2d 178 (1961). On remand the Circuit Court entered judgment in the amount of the jury's verdict, plus interest and costs, for a total of $280,956.10, and

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[1] 28 U.S.C. § 1331 provides for federal question jurisdiction.

28 U.S.C. § 1343(3):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; * * *

ordered that upon payment or deposit of that sum with the Cook County Treasurer, fee simple title would vest in the Trustees. The sum being deposited, the court declared fee simple title to be in the Trustees and authorized them to take possession. An appeal from this judgment resulted in affirmance, *Trustees of Schools* v. *Schroeder,* 25 Ill. 2d 289, 184 N.E. 2d 872 (1962), and rehearing was denied.

Schroeders then filed in the Circuit Court motions to vacate the judgment vesting title in the Trustees, and Schroeders and others moved for leave to file a taxpayers' suit to enjoin execution on the condemnation judgment. The motions were denied and the Illinois Supreme Court affirmed these rulings. *People ex rel White* v. *Busenhart,* 29 Ill. 2d 156, 193 N.E. 2d 850 (1963). Rehearing was denied and no petition for certiorari to the United States Supreme Court was filed. The suit before us followed.

We see no necessity of discussing sections 1981 and 1982 of Title 42, which are plainly designed to implement the fourteenth amendment by providing equal rights for negroes. *Agnew* v. *City of Compton,* 239 F. 2d 226, 230 (9th Cir. 1956). This case rests upon allegations of individual violations of section 1983[2] and conspiratorial violations of section 1985(2).[3]

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[2] 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(U. S. Court of Appeals Opinion)

The complaint alleges that the defendant-Trustees and their attorneys conspired, at the hearing upon the motion to vacate the condemnation judgment, to deprive Schroeders of their "rights and privileges" and due process in violation of section 1985(2). The only facts alleged to support the general allegations are that plaintiffs, by virtue of the conspiracy, were deprived of their "right to present evidence consisting of oral testimony, exhibits and written documents" in support of their petition in the Circuit Court to vacate the judgment entered against them. It appears from the record that the Circuit Court denied them this "right" after the Illinois Supreme Court in the second appeal, opinion at 25 Ill. 2d 289, 184 N.E. 2d 872, had affirmed the very judgment the petitioners sought to have the Circuit Court vacate. There is no allegation of

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[3] 42 U.S.C. § 1985(2):

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment . . .; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State . . ., with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; * * *

We presume Schroeders are relying on § 1985(2) in this respect since it is clear that § 1985(1) and (3) have no application to their suit.

conspiracy to interfere with or injure any Schroeder witness; none of deprivation of equal protection of the law; and none that these defendants were acting under color of state law. Thus no claim was presented under 42 U.S.C. § 1985(2) and 28 U.S.C. § 1343(3) upon which jurisdiction could be based, and no federal question arises under the fourteenth amendment to confer § 1331 jurisdiction.

Most of the complaint is devoted to the claim that the Schroeders were deprived of their fee title without due process because the Circuit Court at the trial ordered that the Trustees acquired a fee simple title in Schroeders' property, and the Illinois Supreme Court affirmed the order, all allegedly without authority in law. They allege that Illinois statutory and decisional law limited the authority of the courts, on the facts of the condemnation case, to transferring of an easement for school purposes, leaving Schroeders a reversionary interest. The claim is that the Illinois court decisions in this case deprived them of due process under the fifth and fourteenth amendments, and that if execution upon the condemnation judgment is made and if defendants are permitted to take and hold possession of the fee title Schroeders will further be denied due process.

The relief sought is a declaration that the Illinois court decisions, in proceedings at trial and on review, are void even though the courts had jurisdiction of the subject matter and parties. These allegations, even if true, do not present either a ground for federal question jurisdiction under 28 U.S.C. § 1331, since the state court admittedly had jurisdiction over the parties and the subject matter, *Chance* v. *County Board of School Trustees,* 332 F. 2d 971,

974 (7th Cir. 1964); or a ground upon which to obtain review of the state court proceedings by a federal district court under 28 U.S.C. § 1343 through invocation of 42 U.S.C. § 1983, *Goss* v. *State of Illinois*, 312 F. 2d 257, 259 (7th Cir. 1963). Schroeders attempt "to thwart" the final state court judgments by relitigating in a trial *de novo* the very issues which were, or should have been, raised in the state courts concerning state law, and upon which certiorari to the United States Supreme Court might have been sought. To paraphrase what was said in *Goss* about permitting such "appellate procedure," if it were done many state court judgments would be faced with chaos and unenforceability. 312 F. 2d at 259. Thus there is also no independent ground for jurisdiction to enter a declaratory judgment under 28 U.S.C. § 2201.

The injunctive relief sought against state officials from enforcing the condemnation judgment, and against the Trustees from taking possession under their fee title, presupposes a declaration that the decisions of the Illinois judges in the Schroeder condemnation case are void. The same is true of the relief sought against defendant Korzen, County Treasurer, custodian of the funds due Schroeders. And no allegation of any violation of Schroeders' civil rights is made against defendants Wahler and Pecyna, their former attorneys.

For the reasons given, the judgment is affirmed.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

CONSTITUTIONAL PROVISIONS INVOLVED.

Fifth Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX C

STATUTES INVOLVED.

28 U.S.C., § 1331(a). Federal question; amount in controversy.

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C., § 1343(3). Civil rights and elective franchise.

To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

42 U.S.C., § 1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977.

(Statutes Involved)

42 U.S.C., § 1982. Property rights of citizens.

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. R.S. § 1978.

42 U.S.C., § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.

42 U.S.C., § 1985. Conspiracy to interfere with civil rights —Preventing officer from performing duties.

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of the lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(Statutes Involved)

Obstructing justice; intimidating party, witness, or juror.

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges.

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of

(Statutes Involved)

the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R.S. § 1980.

APPENDIX D

Traverse filed by Gerald A. Schroeder and Clara Johnson Schroeder, respondents, filed December 4, 1959, which is as follows:

(Title, signatures and verification not abstracted.)

Now comes the respondents, Gerald A. Schroeder, and Clara Johnson Schroeder, by their attorneys, Wahler & Pecyna, and traverses, denies and controverts the petitioner's right to condemn, and calls for strict proof of the following matters alleged in the petition:

1. Denies that the Trustees of Schools of Township 42, North Range 11, East of the Third Principal Meridian, Cook County, Illinois, are, by the "School Code" of the State of Illinois, effective May 1, 1945, and as subsequently amended, authorized or empowered to acquire by eminent domain proceedings, or otherwise, or to hold for the benefit of the School Districts of said township, lands necessary for school purposes.

2. Denies that School District Number 57, Cook County, Illinois, is a duly organized or established or an existing school district located in Township 42, North Range 11, East of the Third Principal Meridian, Cook County, Illinois.

3. Denies that said School District, as alleged in the petition, is governed by a Board of Education pursuant to the provisions of the school code of the State of Illinois.

4. Denies that in accordance with the provisions of the school code of the State of Illinois, that the Board of Education, School District Number 57, Cook County,

(Traverse)

Illinois, passed a resolution to acquire a fee simple title by purchase or condemnation or otherwise the following described real estate, to wit:

> That part of the South half (½) of the Southeast Quarter (¼) of the Northeast quarter (¼) of Section 34, Township 42, North Range 11, East of the Third Principal Meridian lying Westerly of the Center line of Rand Road
>
> *also*
>
> That part of the North half (½) of the Southeast Quarter (¼) of the Northeast Quarter of Section 34, Township 42, North Range 11, East of the Third Principal Meridian lying Westerly of the center line of Rand Road, except the North 138 feet thereof.

5. Denies that the purpose of acquiring said real estate is to provide necessary school facilities in connection with the schools of said district.

6. Denies that a fair and reasonable cash offer has been made for said property to the owners thereof, and asserts that the offer made was wholly unfair and unreasonable.

7. Denies that petitioner has any right or power under and by virtue of the school code of the State of Illinois, effective May 1, 1945, and as subsequently amended to condemn said property as alleged in said petition, or that the said property, as alleged in said petition, lies wholly within School District Number 57, Cook County, Illinois.

8. Denies that this proceeding is valid.

9. Denies that the petitioner has taken each and every one of the necessary steps required to be taken in a con-

(Traverse)

demnation proceeding of the property described in the petition filed herein.

10. Denies that the petitioner has any legal right to condemn the property described in said petition or any part thereof.

11. Denies that the purpose of acquiring said real estate is to provide necessary school facilities, in whole or in part, and asserts that the property described in said petition is wholly in excess of that which is necessary, and further asserts that either all or a part thereof is for purposes or uses other than school facilities.

12. Denies that the petitioner has been authorized to acquire, hold and use the aforesaid property as described in the petition for the purposes or uses described in the petition, and asserts that the petitioner is acquiring said property by condemnation to hold and use for purposes other than necessary school facilities and for purposes and uses which are not authorized by statute.

13. Denies that a lawful and valid resolution was passed by the Board of Education, School District Number 57, Cook County, Illinois, authorizing the condemnation of purchase of the property described in said petition.

14. Denies that any reasonable or fair plan or scheme has been arrived at, prepared or analyzed by the Board of Education, School District Number 57, Cook County, Illinois, regarding the schools in said district; or that a fair and reasonable plan or scheme as to the future needs of said district has been presented to it and considered.

15. Denies that the compensation to be paid by the petitioner for the said property described in the petition

(Traverse)

cannot be agreed upon between the petitioner and the respondents, Gerald A. Schroeder and Clara Johnson Schroeder, and each of them, since no fair and reasonable offer had been submitted to them.

16. Denies that the purported use of the property by the petitioner has been determined upon definitely, and irrevocably for the sole and exclusive purpose of providing schools presently or in the future for said district; and further denies that any degree of certainty exists for the purported use of property in the future.

17. Respondents further say that the area of land as described in said petition, sought to be acquired by condemnation, is grossly excessive for use as a school or for school purposes, and said taking in whole or in part is unnecessary.

18. Respondents further say that the action herein is arbitrary, capricious, unnecessary, and wholly without the authority of the Board of Education, School District Number 57, Cook County, Illinois, or the Trustees of Schools, Township 42, North Range 11, East of the Third Principal Meridian, Cook County, Illinois.

19. Denies that said tract, described in petitioner's Petition to Condemn, is convenient and useful for the purported intended purposes of schools, and respondents say that there are other tracts more convenient and useful for the purported intended purpose.

20. Respondents say that the land in question is located in a highly congested area, on a main arterial highway, which carries tremendous traffic at high speed, and that placing a school or schools thereon is highly dan-

(Traverse)

gerous to the children in said district, having in mind the area, location and use of way.

Wherefore, your respondents, Gerald A. Schroeder and Clara Johnson Schroeder, and each of them, respectfully pray that said petition be stricken and dismissed, and all costs be taxed to the petitioner.

Amendment to traverse filed by Gerald A. Schroeder and Clara Johnson Schroeder, respondents, on May 13, 1960, which is as follows:

Now comes Gerald A. Schroeder and Clara Johnson Schroeder by Wahler & Pecyna, their attorneys, and by leave of Court first had and obtained, files their Amendment to their Traverse heretofore filed herein by adding additional Paragraphs thereto numbered 21, 22 and 23, which are as follows:

21. Respondents further say that the area of land, as described in said Petition sought to be acquired by condemnation is farm land and that all of said property lies outside of the City or Village limits of Mount Prospect or any incorporated City or Village; Respondents further say that their dwelling, house, residence and home is located and situated upon the area of land, as described in said Petition and that all or at least the majority of the property sought to be condemned by the petitioners is within 40 rods of the dwelling of the respondents and owners of the land mentioned in the Petition and sought to be condemned by the Petitioners.

And further deny that the petitioners have any right or power under and by virtue of The School Code of the State of Illinois, effective May 1, 1945, and as subse-

quently amended to condemn all or any part of said property, as alleged in said Petition by reason of the aforesaid facts.

22. The Respondents again specifically deny that the Petitioners have any right or power under and by virtue of The School Code of the State of Illinois, effective May 1, 1945 and as subsequently amended to condemn any part or all of said property, as alleged in said Petition and affirmatively plead and show unto the Court that under the facts, as alleged in Paragraph 21 herein, the area mentioned in whole or in part is, by Statute, excluded from condemnation by virtue of Section 14-7 of The School Code of Illinois, Chapter 122 of the Smith-Hurd Illinois Annotated Statutes, which specifically provides that no tract of land outside the limits of any incorporated City or Village and within 40 rods of the dwelling of the owner shall be taken by the Board of Directors without the owner's consent.

23. Respondents further say that they do not consent to the condemnation or taking of any part or all of the area described in the Petition and which they are the owners of; and further plead and say that Section 14-7 of The School Code specifically denies and controverts the Petitioners' right to condemn the area alleged in the Petition and further by reason of the hereinabove mentioned facts; Section 14-7 of The School Code of Illinois, Chapter 122, Smith-Hurd Illinois Annotated Statutes, provides as follows:

> "Whenever any lot or parcel of land is needed by any university, college, township high school or other educational institution established and supported by

(Traverse)

this State or by a township therein, or by a school district, as a site for a building or for any educational purpose, and compensation for the lot or parcel of land cannot be agreed upon between the owners thereof and the trustees, board of education, or other corporate authority of the educational institution or school district, the corporate authority of the educational institution or school district may have the compensation determined in the manner provided by law for the exercise of the right of eminent domain. In Class I counties, the school board shall engage counsel, pay all expenses and institute suit without any authorization by the county board of school trustees; and the proceedings shall be in the name of the county board of school trustees for the use of the school district. But no tract of land outside the limits of any incorporated city or village and within 40 rods of the dwelling of the owner of the land shall be taken by the board of directors, created in Article 6, without the owner's consent; provided, however, that a tract of land outside the limits of any incorporated city or village lying not less than 200 feet from the dwelling of the owner of the land, which adjoins and is adjacent to a school site being used for school purposes may be taken by the board of directors in the manner provided by law for the exercise of the right of eminent domain for the purpose of enlarging such school site for educational and recreational purposes."